84-833 (1)

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ALEXANDER L. STEVAS,
CLERK

No. _____

IN THE

Supreme Court Of The United States

October Term, 1984

BEAN DREDGING CORPORATION,
Appellant,

v.

STATE OF ALABAMA,
Appellee.

On Appeal from the Court of Civil Appeals of Alabama
and the Supreme Court of Alabama

JURISDICTIONAL STATEMENT

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November 20, 1984

QUESTION PRESENTED

The question presented is whether a statutory framework of use taxation, which exempts certain equipment of ships, vessels or barges but limits that exemption to ships, vessels or barges "constructed or built within the state (Alabama)" constitutes an impermissible discrimination against commerce under Article I, Section 8, or violates the due process or equal protection clauses of Amendment XIV of the United States Constitution.

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No. .....

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BEAN DREDGING CORPORATION,
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v.

STATE OF ALABAMA,
Appellee.

On Appeal from the Court of Civil Appeals of Alabama and the Supreme Court of Alabama

JURISDICTIONAL STATEMENT

Bean Dredging Corporation, the appellant in this Court ("the Taxpayer"), appeals from the final judgment of the Court of Civil Appeals of Alabama, as to which certiorari was denied by the Supreme Court of Alabama and in which the courts of Alabama upheld imposition of use taxes against the Taxpayer, who submits that such taxation is in violation of the Commerce Clause and other provisions of the United States Constitution and is contrary to recent decisions of this Court set forth below.[1]

[1]Pursuant to Supreme Court Rule 28.1, the appellant states that it is a subsidiary owned 75% by Bean Services Corporation, which is, in turn, owned 75% by C. F. Bean Corporation. Other subsidiaries of C. F. Bean Corporation are wholly-owned with the exception of Eagle Dredging Corp., also owned 75% by Bean Services Corporation, and a small 50%-owned corporation engaged in international operations, Vobemex International.

OPINIONS BELOW

The opinion of the Court of Civil Appeals of Alabama, dated April 25, 1984, upholding taxation of the Taxpayer, is reported at 454 So.2d 1009 and appears in the appendix hereto at pages A-2 through A-6. The Taxpayer's timely application for rehearing was overruled by order of June 6, 1984 (A-7), and the Alabama Supreme Court denied the Taxpayer's timely petition for certiorari by order of July 27, 1984 (A-1), said action being the action of the highest state court in this case. The opinion of the Circuit Court of Montgomery County, Alabama, dated September 29, 1983, is set forth at A-8 to A-10. Notice of appeal (A-11, 12) was filed with both the Court of Civil Appeals and the Supreme Court of Alabama as well as the Circuit Court of Montgomery County, the initial court that had the record in this case, all on September 4, 1984.

This appeal is taken pursuant to 28 U.S.C. § 1257 (2). In addition, because of the nature of the issues, the case would also be eligible for grant of certiorari to the state courts under 28 U.S.C. § 1257 (3). The federal questions referred to above were raised by the Taxpayer at all stages of the litigation.[2] Under the practice of this Court, the time for docketing this appeal is computed from the date of denial of certiorari by the highest state court; and, by orders of October 15 and 31, extensions of time totaling less than thirty days were granted to and including November 20, 1984.

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[2]It is noted that the validity of a state statute is sustained when the state court holds the statute applicable to a particular set of facts as against a contention that such an application is invalid on federal grounds. See, for example, *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282 (1921), involving a sale of grain in interstate commerce where the defendant contended plaintiff had not qualified to do business in the state. This Court stated, in striking the defense, "That the statute was not claimed to be invalid in toto and for every purpose does not matter." 257 U.S. at 290.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Section 40-23-61 of the Code of Alabama of 1975 levies a use tax in Alabama as follows:

> "(a) An excise tax is hereby imposed on the storage, use or other consumption in this state of tangible personal property . . . at the rate of 4% of the sales price of such property, . . ."

It then provides, in Section 40-23-62, for exemptions including:

> "The storage, use or other consumption in this state of the following tangible personal property is hereby specifically exempted from the tax imposed by this article:
>
> "(14) The use, storage or consumption of materials, equipment and machinery which enter into and become a component part of ships, vessels or barges of more than 50 tons burden *constructed or built within the state.*" (Emphasis supplied.)

Article I, § 8, Clause 3, of the United States Constitution provides in part: "The Congress shall have power . . . To regulate Commerce with foreign nations, and among the several states . . ."; and Amendment XIV thereto provides in part: ". . . nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

This use tax case presents a classic example of imposition on an out-of-state taxpayer of taxes that discriminate against interstate commerce. The case was tried on briefs and a stipulation of facts. Thus, there was no testimony before the trial court and, as a result, no presumption of

correctness is to be granted to the facts stated by the court. *Kessler v. Stough,* 361 So.2d 1048 (Ala. 1978).

The use taxes here involved were assessed on the purchase of dredging discharge pipe attached to dredging barges or vessels (hereinafter for brevity referred to simply as "vessels") used by the Taxpayer in performing work on the Theodore Ship Channel project in Mobile Bay. The dredging work was performed by three barges specially constructed for the purpose of dredging, each of which was built outside of Alabama. All are named (such as the "Dave Blackburn") and are registered with the U.S. Coast Guard. It is, thus, uncontested that they are vessels. Their registered weights range up to almost 2,400 tons and their actual physical weights up to over 5,000 tons, the largest vessel being almost the length of a football field. They each are of sufficient size that they have sleeping accommodations and mess facilities for their crews. The dredging discharge pipe is also correspondingly heavy and the amount in use sometimes lengthy.

The discharge pipe is firmly attached to the vessels by heavy bolts. The vessels move back and forth and up and down the channel in order to dislodge and remove material (often referred to as spoil) from the bottom and sides of the channel. Further, in order to do dredging work, a vessel must necessarily deposit that spoil away from the channel or else nothing will have been accomplished. That is the function of the discharge pipe.

The discharge pipe is one of three constituent parts (or types of equipment) that are necessary, according to the stipulation of facts in this case, for the vessels to perform any dredging work — on the Theodore project as well as other dredging work.[3] Although the Court of Civil Appeals

[3]Stipulation of Fact (7) states: "In order to perform dredging work on the Theodore project as well as other dredging work, the above dredging

seemed to feel the discharge pipe was not always necessary, that is contrary to Stipulation (7).[4]

The Alabama courts have applied a broad interpretation to Use Tax Exemption (14). In *State v. Sprinkle Net Shop,* 351 So. 2d 608 (Ala. Civ. App. 1977), the court held that fishing nets, trawl boards, cables and related equipment on a commercial fishing vessel built in Alabama were exempt as component parts of that vessel, stating with specific reference to the fishing nets, "We consider that as many such nets as a fisherman might wish to purchase would be equally exempt . . ." However, under the State's position taken as to this taxpayer, Exemption (14) is given a narrow construction, and the operator of a dredging barge (the exemption at issue specifically applies to both vessels and barges) is apparently not entitled to exemption for even a reasonable amount of the discharge pipe necessary for the barge to perform its work.

The Alabama courts upheld imposition of these use taxes against the Taxpayer.[5] The federal question set forth above was raised in the Taxpayer's complaint and briefs at

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barges or vessels have attached to them (a) either a rotating cutter or a high pressure water jet system for dislodging material from the bottom and sides of the channel; (b) a large diesel-driven centrifugal pump to vacuum the material from the channel up through a suction pipe at the bow of the dredging barge or vessel and then pump that material into discharge pipe at its stern; and (c) the dredging discharge pipe to deposit the material away from the channel. There is a continuous flow of such material from the channel to the discharge point."

[4]The appeals court somehow seems to have misinterpreted the relationship between the vessels and the discharge pipe. It stated, at the beginning of its opinion, that the vessel is used to lay the pipe, thus making the pipe of necessity something independent from it. However, that is not the case. Stipulation (7) shows clearly that the pipe is attached to the vessel and is the equipment used to deposit the spoil material away from the channel.

[5]At issue are approximately $150,000 in use taxes imposed on the discharge pipe. However, the Taxpayer has paid Alabama, in connection with the Theodore project, the not inconsiderable sum of approximately $250,000 in use taxes that are not under any contest or claim for refund.

both the trial and appellate levels (as well as in its informal administrative conferences with the Alabama Department of Revenue). The Taxpayer contended that such a statutory framework of taxation, containing the discriminatory language underlined in "Statutes Involved" above, constitutes an impermissible discrimination against interstate commerce and that it was deprived of due process.[6] However, the courts attempted to avoid ruling on those questions. The appeals court based its action on the fact that the "taxpayer argues that the qualifying portion (the phrase underlined above) is unconstitutional." (Actually, the Taxpayer's contention was broader — see Footnote 6.) The specific language of the court (which is in the next to last paragraph of its opinion at the bottom of A-5), will be discussed under substantiality of the question presented, *infra,* where it will be shown that the construction employed is both contrary to the laws of Alabama and accepted canons of statutory construction applied by this Court. Accordingly, the Taxpayer has brought the case to this Court on appeal.

REASONS THE QUESTION IS SUBSTANTIAL

I. Imposition of taxes under the state framework of taxation here involved discriminates against interstate commerce and is in direct conflict with decisions of this Court.

The framework of use taxation involved here consists of imposition of the use tax and an exemption for certain

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[6]For example, the Taxpayer contended its briefs before the Alabama Court of Civil Appeals, that "a statutory framework of taxation, containing an impermissible discrimination against interstate commerce, is invalid as applied to the particular transaction being discriminated against." Again, in its initial pleading, it contended that the statute involved is in violation of the commerce clause and the due process and equal protection clauses of the Constitution of the United States.

equipment of ships, vessels or barges "*constructed or built within the state.*" (Emphasis supplied.) Thus, the exemption is only available if the equipment is used on a vessel built within Alabama. If the dredging discharge pipe were subjected to tax (as it was here) when used on a vessel constructed or built outside Alabama, there is a clear discrimination against it and in favor of the very same type of equipment when used on a vessel constructed or built within the state. The discrimination is even more invidious and arbitrary because there can be no rational basis for the limiting phrase "constructed or built within the state" — it is not based on where the equipment was bought but where the vessel on which it is used was built. For example, even though the discharge pipe might have been purchased in Alabama, it would still be subject to tax if it were used on a vessel constructed or built elsewhere.[7] On the other hand, if the discharge pipe were purchased elsewhere, it would be exempt from the use tax as long as it were used on a vessel built in Alabama. Consequently, the only way one could become entitled to this exemption would be to purchase a vessel that itself was built in Alabama.

This Court has stated, in many cases including those cited below, that no state, consistent with the Commerce Clause, may "impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business." It has struck down similar discriminatory state legislation as far back as such cases as *Welton v. Missouri*, 91 U.S. 275 (1876), where the Court held invalid a statute that "discriminat[ed] in favor of goods, wares, and merchandise which are the growth, product, or manufacture of the State, and against those which

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[7]The Alabama sales tax has an exemption with identical language — Section 40-23-4 (13) of the Code of Alabama of 1975.

are the growth, product, or manufacture of other states or countries. . . ." *Id.*, at 277.

This it has done in three recent cases like the present one that involved exemptions or credits that discriminated against interstate commerce, two of which were decided in the recently ended term of this Court:

(i) *Maryland v. Louisiana,* 451 U.S. 725 (1981), in which Louisiana's use tax on Outer Continental Shelf oil, which granted exemptions and credits favoring local residents over out-of-state purchasers (just as the Alabama statute here does on its face), was stricken down as unconstitutional and its collection enjoined.

(ii) *Westinghouse Electric Corp. v. Tully,* ..... U.S. ....., 80 L.Ed.2d 388 (1984), in which this Court struck down application of New York's franchise tax which offered credits that discriminated against foreign commerce in violation of the Commerce Clause. The credit was based on property shipped for export "from a regular place of business within New York" just as in the instant case Exemption (14) is limited to "ships, vessels or barges constructed or built within the state."

(iii) *Bacchus Imports v. Dias,* 468 U.S. ....., 82 L.Ed.2d 200 (1984), in which this Court struck down a 20% excise tax of Hawaii imposed on sales of liquor at wholesale that granted exemptions for a certain locally produced brandy and fruit wine just as Exemption (14) favors locally built ships, vessels and barges.

See also *Boston Stock Exchange v. State Tax Commission,* 429 U.S. 318 (1977), striking down a stock transfer tax that was higher on out-of-state transfers.

It would, thus, appear clear that under these recent decisions of this Court, the statutory framework of taxation under which the Taxpayer was taxed in Alabama is invalid

under the Commerce Clause. This is true regardless of how little or how much discharge pipe is exempt,[8] for this Court, in each of the three recent cases referred to above, has held, that when a tax is designed to have discriminatory economic effects, the Court "need not know how unequal the tax is before concluding that it unconstitutionally discriminates."

The state appeals court, however, sought to avoid ruling on that issue by the following treatment set forth at the end of its opinion (last paragraph on A-5):

> "It appears to this court that in view of the qualifying portion of the pertinent exemption statute to wit: '. . . constructed or built with the state' there is serious doubt as to the applicability of the statute to the instant taxpayer. However, taxpayer argues that the qualifying portion is unconstitutional. In view of the above, we, as the learned and distinguished trial judge, do not find it necessary to resolve that issue."

Thus, the appeals court, by some procedural or constructional theory not fully articulated, is attempting to remove a portion of the statute in an attempt to avoid the constitutional issue and, in doing so, to give the statutory framework broader coverage than it had when enacted.

That states cannot use such allegedly non-federal grounds to avoid ruling on federal questions has long been established by this Court, and the Supreme Court will apply its own standards in reviewing such treatment. This it has done as long ago as *Ward v. Love County*, 253 U.S. 17 (1920), a case involving property taxation of Indian lands where the state court, in an effort to avoid the unconstitutional imposition of such taxes, claimed they had been paid voluntarily but where this Court's examination showed

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[8]As shown by Stipulation of Fact (7), at least some reasonable amount of discharge pipe should fall within the exemption.

they had not. As a result, this Court decided the federal issue and held the taxation unconstitutional. More recently, this Court, in *Staub v. Baxley,* 355 U.S. 313 (1958) (ruling unconstitutional an ordinance requiring a license or permit to solicit union members), held (at headnotes 3, 6) that a state could not avoid the federal constitutional issue by imposing a requirement that a defendant attack specific sections of an ordinance. See also *N.A.A.C.P. v. Alabama,* 357 U.S. 449 (1958) (ruling unconstitutional the requirement that an organization file a list of names and addresses of its members), in which the Court (at Part I of the opinion) held that the federal question could not be avoided by ruling that the defendant had to employ mandamus instead of certiorari to review the lower court decision.

Staub v. Baxley is particularly illustrative in that this Court found that the requirement advanced in that case to attack specific sections of an ordinance was contrary to previous Georgia decisions. In this case, excising the exemption from Alabama's use tax structure (or, phrased differently, removing certain portions of a statute that would give the remainder broader coverage) is contrary to the laws of Alabama. In such cases, the taxing framework would encompass more than that enacted by the legislature; and the Alabama courts have held, in the field of taxation, that such statutory construction is improper. Quoting from *Barron-Leggett Electric v. Department of Revenue,* 336 So.2d 1124 (Ala. Civ. App. 1976), *cert. den.,* 336 So.2d 1128 (Ala. 1976) (involving a highway contractors gross receipts tax), "We are convinced . . . that to strike the exemption, thereby imposing the tax upon street construction contracts of cities, towns and counties, would result in imposing a tax by judicial action." As noted, the Alabama Supreme Court denied certiorari. Further, in its

own decisions, it is in accord with the same canon of statutory construction since it has held, "If a clause which violates the constitution cannot be rejected without causing the act to enact what the legislature never intended, the whole statute must fall." *Alabama Public Service Comm. v. AAA Motor Lines,* 272 Ala. 362 at 372, 131 So.2d 172 at 180 (1961). This is also the general law of statutory construction, which has found expression by this Court in *Roe v. Wade,* 410 U.S. 113 (Part XII of the opinion at 410 U.S. 166 (1973)). There this Court held that an unconstitutional exception, which, when striken, would give a statute broader coverage than enacted, resulted in unconstitutionality of the entire statutory framework itself.[9]

Accordingly, we urge this Court to consider the federal question and, since it would appear clear that the statutory framework of taxation violates the Commerce Clause, to strike down its application to the Taxpayer.[10]

II. This issue of discrimination against interstate commerce is sufficiently important that, in the interest of consistent treatment among the states and furthering the strong federal interest to prevent such discrimination, it should be decided by this Court.

As noted above, statutes such as this that discriminate against interstate commerce have recently been struck down in cases involving laws of Louisiana, New York and Hawaii. In order to achieve consistency among the states in our federal system, Alabama ought not be able to im-

[9]It may be noted that a similar contention to that employed in the court below, i.e. striking language to avoid the unconstitutionality of a statute, was unsuccessfully urged on this Court in *Bacchus,* 82 L.Ed.2d at 207, Footnote 7.

[10]The provisions of the Fourteenth Amendment, in cases like this, offer additional reasons for striking down the statutory framework here involved but on grounds similar to those discussed above respecting violation of the Commerce Clause.

pose such discriminatory taxation, or a taxpayer should not be subjected to such discriminatory taxation, when those in other states are not. If this tax as applied here is left to stand, then there will be unfair discrimination not only among taxpayers but also among the taxing states themselves. Further, as a matter of public policy, taxpayers need to know when they do business in another state whether they can be subjected to discriminatory taxation. As stated in *Bacchus,* "It was to prohibit such a 'multiplication of preferential trade areas' that the Commerce Clause was adopted," and, "It is also beyond doubt that the Commerce Clause itself furthers strong federal interests in preventing economic Balkanization." 468 U.S. at ____, 83 L.Ed.2d at 210, 212, citing cases.

CONCLUSION

The Taxpayer submits that, because of the discrimination against interstate commerce, this Court should note probable jurisdiction of this appeal and accept this case. In doing so, it would not have to burden the Court's docket for oral argument since the Alabama statutory framework of taxation, when judged in the light of this Court's recent decisions in *Maryland v. Louisiana, Westinghouse Electric* and *Bacchus Imports,* poses a clear violation of the Commerce Clause. Consequently, this Court could reverse and remand for disposition in a manner not inconsistent with those opinions. In the alternative, it could reverse and remand for disposition in the same manner as to at least a reasonable amount of discharge pipe. In any event, we

urge this Court to note probable jurisdiction and accept this appeal.

Respectfully submitted,

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November 20, 1984

APPENDIX

OFFICE OF
CLERK OF THE SUPREME COURT
STATE OF ALABAMA
MONTGOMERY

July 27, 1984

Re: 83-1039

EX PARTE: BEAN DREDGING CORPORATION
PETITION FOR WRIT OF CERTIORARI TO
THE COURT OF CIVIL APPEALS

(Re: Bean Dredging Corporation, Appellant vs. State of Alabama, Appellee)

You are hereby notified that the following indicated action was taken in the above cause by the Supreme Court today:

* * *

Petition for Writ of Certiorari denied. No opinion. Almon, J. — Torbert, CJ., Faulkner, Embry and Adams, JJ., concur.

* * *

/s/ ROBERT G. ESDALE

Robert G. Esdale, Clerk
Supreme Court of Alabama

STATE OF ALABAMA – JUDICIAL DEPARTMENT
THE COURT OF CIVIL APPEALS
OCTOBER TERM 1983-84

Civ. 4133

Bean Dredging Corporation
v.
State of Alabama

Appeal from Montgomery Circuit Court

HOLMES, JUDGE

Bean Dredging Corporation (taxpayer) appeals the trial court's finding that certain equipment used in taxpayer's business is not exempt from use under § 40-23-62 (14), Ala. Code (1975).

This case was tried on the pleadings and stipulation of facts. The following, properly considered by the trial court, is pertinent.

The taxpayer is in the dredging business and was awarded a contract by the Corps of Engineers to dredge the Theodore Ship Channel in Mobile River. An assessment was made on the purchase of dredging discharge pipe delivered to taxpayer's Alabama job site and the taxpayer was required to pay a use tax on the pipe.

The discharge pipe is part of a discharge transportation system made up of an auger, pump, and barges used to house the pump and auger and to lay the pipe. The discharge pipe is used to transport silt, sand, and sludge from the channel to dumping areas specified in the contract.

The issue in this case is whether the discharge pipe constitutes "materials, equipment and machinery which enter into and become a component part of ships, vessels or barges" and is therefore exempt from use tax under § 40-23-62 (14), Ala. Code (1975).

Section 40-23-62 (14) states in pertinent part:

> "The storage, use or other consumption in this state of the following tangible personal property is hereby specifically exempted from the tax imposed by this article: "(14) The use, storage or consumption of materials, equipment and machinery which enter into and become a component part of ships, vessels or barges of more than 50 tons burden, constructed or built within the state."

The vessels or barges in the instant case are definitely "barges of more than 50 tons burden. . . ." The discharge pipe is approximately twenty-seven inches in diameter, with a three-quarter inch wall. The pipe is attached to the barges at a heavy duty ball joint by some dozen heavy bolts. Each joint of pipe is fifty feet long and weighs five and three-tenth tons. At its greatest distance from the dumping site, over six miles of pipe is required to reach from the barge to the dump.

In order to attach sections of discharge pipe to a dredging barge or vessel, when submerged pipe is involved, it is necessary to shut down its operation for two to three and perhaps more hours; and the sections are of sufficient weight that they have to be handled during the attaching process by a crane mounted on another barge. A similar period of time and usage of a crane is required to detach sections of such pipe from the dredging barge or vessel.

The dredged material could not be loaded onto other barges or vessels due to the amount of clay in its composition. This along with the fact that the spoil had to be deposited at a dump site some miles from the dredging site precluded any other method of transportation besides the discharge pipes. There is some question as to how mobile the barge is when the pipe is attached.

The taxpayer, through able and distinguished counsel, relies heavily on *State v. Sprinkle Net Shop Inc.*, 351 So. 2d 608 (Ala. Civ. App. 1977), to support its contention that the discharge pipe is a component part of the barge as contemplated by § 40-23-62 (14).

The *Sprinkle Net Shop* case appears to be the only Alabama case construing the particular subsection of 40-23-62 that is in-

volved in the present case. In *Sprinkle* this court held that fishing nets used on a shrimp boat were exempt from use tax by virtue of § 40-23-62 (14). However, that case can be distinguished from the case at bar.

In *Sprinkle* the shrimp boat was specially designed and constructed for the purpose of commercial fishing and was unable to serve such purpose without nets. There is no evidence in this case that without the pipe the barge would be useless in the dredging business. In fact, it can be reasonably inferred from the record that there are other methods for transporting dredged material other than discharge pipes. It is true that dredging on this particular job could not be performed properly without the discharge pipes; however, that does not necessarily mean that the pipe is a "component part" of the barge as contemplated by § 40-23-62 (14).

The emphasis of this statute is placed on the determination of whether the evidence shows that the equipment in question becomes a component part of the vessel. The emphasis is not on the particular job to be performed at a given instant, that is only one factor to be considered and is not necessarily controlling. Just because a certain part is necessary to accomplish a particular job does not automatically make that part a "component part" within the meaning of the statute.

To stretch an analogy, a crew is certainly necessary for the operations of the dredging barge, but it [is] also clear that a crew of men is not a "component part' of the vessel.

A sensible construction must be given to a statute and any general terms used in the statute should be so limited as to give a practical, reasonable, and sensible application. *Trailway Oil Co. v. City of Mobile,* 271 Ala. 218, 122 So. 2d 757 (1960). To construe the present statute so as to include the pipe in question in the exemptions would not lead to a sensible application.

In the present case it does not logically follow that over six miles of pipe can be a component part, as intended by the legislature when it enacted § 40-23-62 (14), of a barge only as long as a football field (one hundred yards). To hold otherwise

would be a strained interpretation of the statute. It is not logical that a component part could overwhelm the vessel. There could conceivably be no limit on the length of pipe used. To hold that pipe stretching from Mobile to Muscle Shoals is a component part of a barge is not reasonable to say the least.

The fact that the auger, the pump, and the discharge pipe together are called a discharge transportation system is also indicative that the pipe is a separate piece of equipment apart from the barge. In other words, the function of the discharge pipe is sufficiently separate or distinct from the function of the barge so that they can be viewed as two individual pieces of equipment used in conjunction to remove the sand and silt from the channel.

It also appears that the pipes, although certainly equipment, do not enter into and become "a component part" of the barge. It is fairly evident, in view of the evidence in original submission, that a barge cannot be very navigable with six miles of pipe attached.[1] When moving from site to site, the pipe must be disassembled and loaded on another barge or towed behind a self-propelled vessel to transport it.

An exemption statute uncertain in language is to be construed against the taxpayer. *State v. Sprinkle Net Shop, Inc.*, 351 So. 2d 608 (Ala. Civ. App. 1977). In view of the above, this court believes it would be contrary to the intent of the legislature to hold that the discharge pipe is exempt from use tax. In other words, we find that the trial court was correct in determining that the pipe was not exempt.

It appears to this court that in view of the qualifying portion of the pertinent exemption statute to wit: ". . . constructed or built within the state" there is serious doubt as to the applicability of the statute to the instant taxpayer. However, taxpayer argues that the qualifying portion is unconstitutional. In view of the above, we, as the learned and distinguished trial judge, do not find it necessary to resolve that issue.

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[1]The trial court was not required in this instance to consider evidence submitted to it after entry of its decree.

This case is due to be and is affirmed.

AFFIRMED.

Wright, P. J., and Bradley, J., concur.

I, John H. Wilkerson, Jr., Clerk of the Court of Civ. Appeals of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument (s) herewith set out as same appears of record in said court. Witness my hand this 25th day of April, 1984.

/s/ John H. Wilkerson, Jr.

Clerk, Court of Civil Appeals of Alabama

OFFICE OF
CLERK OF THE COURT OF CIVIL APPEALS
STATE OF ALABAMA
MONTGOMERY

Re: CIV. 4133 June 6, 1984

Bean Dredging Corporation, vs. State of Alabama,
Appellant Appellee

You are hereby notified that the following indicated action was taken in the above cause by the Court of Civil Appeals:

* * *

Application for rehearing overruled. No opinion written on rehearing.

* * *

/s/ JOHN H. WILKERSON, JR.
Clerk, Court of Civil
Appeals of Alabama

IN THE CIRCUIT COURT OF
MONTGOMERY COUNTY, ALABAMA

BEAN DREDGING CORPORATION,	)	
	)	
PLAINTIFF/APPELLANT	)	
	)	
V.	)	CASE NO.
	)	CV-82-1529-PH
STATE OF ALABAMA,	)	
	)	
DEFENDANT/APPELLEE	)	

FINAL JUDGMENT

This action is an appeal by Bean Dredging Corporation from a final assessment by the Alabama Department of Revenue of $133,662.85 in deficient use taxes. This appeal was properly filed under § 40-2-22, Code of Alabama, 1975. The case is submitted on the pleadings, written stipulation of facts, oral argument and briefs.

Bean Dredging Corporation (Bean) is a corporation organized under the laws of the State of Louisiana and qualified to do business in Alabama. The business performed in Alabama using materials pertinent to the assessment was done by the taxpayers pursuant to a contract awarded to Bean by the Corps of Engineers, Mobile District, for dredging of the Theodore Ship Channel in the Mobile River. The assessment was entered as a result of Bean's failure to report and pay use tax on the purchase of dredging pipe delivered by a Texas vendor to Bean's Alabama job site on the channel. The pipe is a part of a transportation system made up of an auger, a pump, and barges used to house the auger and pump and lay the pipe. The dredge pipe was used by Bean to transport silt, sand and sludge from the dredging site to dumping areas specified under the contract. Bean had paid four percent consumer's use tax on approximately $1,000,000.00 worth of dredging pipe for the

period January 1 through September 30, 1979 before making an independent determination that the taxes were not due. Bean has filed a Petition for Refund for these taxes previously paid, which has been continued pending the outcome of this litigation.

The contract for dredging the Theodore Ship Channel specified that the spoil materials be deposited on a spoil island.

The Stipulation of Facts which has been filed with this Court is attached to this order and made a part hereof.

The issues presented here were whether the dredging discharge pipe constituted "materials, equipment and machinery which enter into and become a component part of ships, vessels or barges" and are therefore exempt from Alabama use tax under § 40-23-62(14), Code of Alabama, 1975 and whether that statute is constitutional.

Under these circumstances the Court has concluded that such dredging discharge pipe is not material or equipment which becomes a component part of the barges and is therefore subject to Alabama use tax. Section 40-23-62, supra, states in pertinent part:

> "The storage, use or other consumption in this state of the following tangible personal property is hereby specifically exempted from the tax imposed by this article:
>
> (14) The use, storage or consumption of materials, equipment and machinery which enter into and become a component part of ships, vessels or barges of more than 50 tons burden, constructed or built within the state."

A system of pipe stretching 6½ miles and weighing 3,648 tons does not come within the exemption. The discharge pipe, at its greatest length, weighs more than the heaviest barge. Plaintiff urges that the case of *State v. Sprinkle Net Shop*, 351 So.2d 608 (Ala.Civ.App. 1977) is controlling in this instance. In that case, the appellate court held that fishing nets and trolls were component parts of a fishing boat. The court also noted that the nets and their component parts "may be removed without affecting the seaworthiness of the vessel." A pipeline transportation system does not fit the characteristics

of, and is not analogous to, fishing nets. Fishing nets may be stored on the boat, transported with ease when the boat is mobile and in no way hamper the seaworthiness of the boat. The exemption found at § 40-23-62 (14), supra, is not applicable in the case at bar, as the dredging discharge pipe does not constitute "materials, equipment and machinery which enter into and become a component part of ships, vessels or barges."

The Plaintiff also contends that § 40-23-62 (14), supra, limiting the exemption to vessels or barges constructed or built within the State, is violative of the Commerce Clause and other provisions of the constitutions of the United States and the State of Alabama. In light of the above holding, any discussion of that issue is unnecessary and pretermitted. It is, therefore,

ORDERED, ADJUDGED and DECREED by the Court that the dredging discharge pipe does not qualify for the use tax exemption found at § 40-23-62 (14), supra, and the storage, use or other consumption in this State of the discharge pipe is therefore subject to Alabama use tax. It is, further,

ORDERED, ADJUDGED and DECREED by the Court that the final assessment of the State Department of Revenue for use taxes under date of October 1, 1982, in the amount of $133,662.85 is correct as entered and due to be affirmed. It is, further,

ORDERED, ADJUDGED and DECREED by the Court that all court costs accruing in said action be, and the same are hereby taxed against Taxpayer, for which execution may issue.

DONE this the 29th day of September, 1983.

/s/ JOSEPH G. PHELPS

Circuit Judge

IN THE SUPREME COURT OF ALABAMA
and
THE COURT OF CIVIL APPEALS OF ALABAMA

BEAN DREDGING CORPORATION, Appellant,	)	No. 83-1039 (In Supreme Court)
vs.	)	and
STATE OF ALABAMA, Appellee.	)	No. CIV 4133 (In Court of Civil Appeals)

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Bean Dredging Corporation, the Appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Court of Civil Appeals of the State of Alabama, affirming judgment against the Appellant for use taxes assessed by the Alabama State Department of Revenue, which judgment was entered in this action on April 25, 1984, and as to which said court overruled Appellant's timely application for rehearing by order of June 6, 1984, and the Supreme Court of the State of Alabama denied Appellant's timely petition for certiorari by order of July 27, 1984. This notice is, therefore, filed with both the Court of Civil Appeals and the Supreme Court of Alabama.

This appeal is taken pursuant to 28 U.S.C. § 1257 (2).

/s/ Robert R. Reid, Jr.

Robert R. Reid, Jr.
1400 Park Place Tower
Birmingham, Alabama 35203
(205) 252-4500
Counsel for Appellant

Bradley, Arant, Rose & White
Of Counsel

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing notice of appeal was served on Hendon B. DeBray and B. Frank Loeb, Esqs., Assistant Attorneys-General of Alabama and counsel for the Alabama State Department of Revenue, by mailing the same to them, via United States mails, first class postage prepaid, directed to their office in Montgomery, Alabama, this 2nd day of September, 1984. I further certify that all parties required to be served have been served.

/s/ ROBERT R. REID, JR.

Counsel for Appellant

Copy to Circuit Court of Montgomery County, Alabama

FILED: Court of Civil Appeals of Alabama — Sep 4 1984
Supreme Court of Alabama — Sep 4 1984
Circuit Court of Montgomery County, AL — Sep 4 '84

No. 84-833

Office-Supreme Court, U.S.
FILED
JAN 22 1985
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

BEAN DREDGING CORPORATION,
Appellant,

v.

STATE OF ALABAMA,
Appellee.

On Appeal from the Court of
Civil Appeals of Alabama and the
Supreme Court of the State of Alabama

MOTION TO DISMISS

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COUNSEL FOR APPELLEE

BEST AVAILABLE COPY

No. 84-833

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1984

BEAN DREDGING CORPORATION,
Appelllee,

v.

STATE OF ALABAMA,
Appellee.

MOTION TO DISMISS

May it please the Court:

Appellee, State of Alabama, Department of Revenue, pursuant to Rule 16 of the Rules of the United States Supreme Court, moves that the appeal in this cause as filed by the Appellant be dismissed upon the following grounds:

I. LACK OF JURISDICTION

II. LACK OF A SUBSTANTIAL FEDERAL QUESTION

III. THE JUDGMENT RESTS ON AN ADEQUATE NON-FEDERAL BASIS

According to the Jurisdictional Statement filed by Appellant, jurisdiction is claimed based upon the

provisions of 28 U.S.C. §1257(2). In addition, Appellant claims the case is eligible for a grant of certiorari under 28 U.S.C. §1257(3). Both sections require that there be "drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

The Jurisdictional Statement correctly sets forth the Alabama use tax involved. Section 40-23-61 of the *Code of Alabama 1975*, as amended, provides:

> (a) An excise tax is hereby imposed on the storage, use or other consumption in this state of tangible personal property ... at the rate of 4% of the sales price of such property,...

Section 40-23-62 of the *Code of Alabama 1975*, as amended, provides:

> The stroage, use or other consumption in this state of the following tangible personal property is hereby specifically exempted from the tax imposed by this article:
>
> (14) The use, storage or consumption of the materials, equipment and machinery *which enter into and become a component part of* ships, vessels or *barges* of more than 50 tons burden constructed or built within the state. (Emphasis supplied.)

Appellant erroneously calls to the attention of the Court that portion of the above exemption — "constructed or built within the State" — claiming that the highest court of the State of Alabama failed to declare the exemption provision of the statute unconstitutional due to the interstate commerce clause. However, such issue was pretermitted by both the trial court and appellate courts of Alabama by a determination that Appellant did not qualify for the exemption based upon the above-emphasized portion of the exemption. Appellant would not qualify for the use tax exemption regardless of whether the barges in question were constructed or built either within or without the State of Alabama. Additionally, even assuming that the exemption would be sticken as unconstitutional, it is Appellant that is claiming exemption thereunder. A ruling that the exemption is unconstitutional would not therefore change the Alabama courts rulings that the assessment of use tax against appellant was correct. The judgment rested on an adequate non-federal basis and no substantial federal question was involved.

CONCLUSION

In conclusion, the Appellant lacks standing to challenge the constitutionality of the above-referenced use tax exemption. The opinion of the Court of Civil Appeals of Alabama is clear that it did not rule upon, and it was not necessary to consider, the validity of the exemption on constitutional grounds. Therefore, the validity of the statute on the ground of its being repugnant to the Constitution, treaties or laws of the United States was not drawn in question. In view of the foregoing grounds presented herein, Appellee, State of Alabama, requests that this appeal be dismissed for lack of jurisdiction, or in the alternative, if the appeal should be considered a petition for certiorari, then the petition for certiorari should be denied.

CHARLES A. GRADDICK
Attorney General, State of Alabama

B. FRANK LOEB, Chief Counsel
Department of Revenue and Assistant
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No. 84-833

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

BEAN DREDGING CORPORATION,
Appellant

v

STATE OF ALABAMA,
Appellee.

PROOF OF SERVICE

I, Charles E. Crumbley, a member of the Bar of the Supreme Court of the United States, and attorney of record for Appellee, State of Alabama, hereby certify that on the 18th day of January, 1985, I served copies of the foregoing Motion to Dismiss on all parties required to be served by depositing a copy of same in the United States Mail, with first-class postage prepaid, addressed to:

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Office Supreme Court, U.S.
FILED
APR 30 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-833

IN THE

Supreme Court Of The United States

October Term, 1984

BEAN DREDGING CORPORATION,
Appellant,

v.

STATE OF ALABAMA,
Appellee.

On Appeal from the Court of Civil Appeals of Alabama
and the Supreme Court of Alabama

Supplement to Motion for Limited Summary Disposition

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Of Counsel
April 29, 1985

Supplement to Motion for Limited Summary Disposition

To: The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States

Your appellant, Bean Dredging Corporation, the taxpayer in the above appeal ("the Taxpayer"), respectfully prays that this Court will take into consideration with appellant's motion for summary disposition (included in its petition for rehearing heretofore filed on March 27) the very recent decision of this Court in *Metropolitan Life Insurance Co. v. Ward* (No. 83-1274), rendered on March 26, 1985, for the following reasons:

(1) In *Metropolitan Life* (at page 12 of the Court's opinion), the Court stated:

> "We hold that under the circumstances of this case, promotion of domestic business by discriminating against non-resident competitors is not a legitimate state purpose."

In so holding, the Court noted that a tax structure preferring domestic business over foreign, regardless of how framed, is one that the Court rejected last term in an analogous context arising under the Commerce Clause, citing *Bacchus Imports v. Dias,* 468 U.S. ....., 82 L.Ed.2d 200 (1984).

(2) This appeal involves the same type of discrimination through a framework of taxation under which certain equipment attached to ships, vessels or barges is exempt from taxation only if the ship, vessel or barge is "constructed or built within the state [Alabama]." The State, in arguing to support that type of exemption before the Alabama courts, made just the same type of contention ruled against above, stating:

> "In this case the Legislature intended to favor the Alabama-based builders of ships and barges by granting the exemption only to them. If the restrictive clause 'constructed or built within the state' is removed and the remainder of the section is allowed to stand, the intent of the Legislature would be thwarted. If limiting the exemp-

tion to Alabama builders is unconstitutional, the entire exemption must fail."

Then, under decisions by this Court as well as Alabama's own cases, the entire framework of taxation would fail, at least as applied to this transaction, because otherwise the taxing statute would have a broader coverage than it had when enacted.

(3) While the tests of validity of a classification under the Equal Protection and Commerce Clauses are theoretically different (viz., requiring a rational relationship in the former and prohibiting an undue burden on interstate commerce in the latter), this Court made it clear in *Metropolitan Life* that promotion of domestic business at the expense of out-of-state business through discriminatory taxation is not permissible under either clause. In fact, even if the dissent in *Metropolitan Life* were the opinion of the Court, such discrimination should be even less permissible under the Commerce Clause because a classification like the one here involved obviously places a burden on out-of-state sellers or manufacturers. Please see, in particular, the Court's opinion in *Metropolitan Life* discussing the Commerce Clause at footnotes 6, 9-10 (pp. 7, 11-12 of the Court's opinion).[1]

(4) In seeking consistency in this Court's rulings on the question of interstate commerce, it should not allow the dismissal of an appeal to interfere with the precedential value of

[1] *Metropolitan Life* and this appeal show that discrimination in favor of residents or domestic manufacturers (such as involved in this appeal) is not confined to just one tax but may be found throughout the State's taxing structure. In this connection, for example, Alabama's income tax allows the deduction of moving expenses but only to places within the state, Section 40-18-15 (19), Code of Alabama of 1975; and it permits the nonrecognition of gain from sale of a residence as long as the proceeds are reinvested in a residence in Alabama, but not in a residence elsewhere should the taxpayer be moving to another state (contrary to the treatment under the Federal Internal Revenue Code), Sec. 40-18-14 (2) (h). Such discriminatory exemptions would appear to violate both the Equal Protection and Commerce Clauses, see *WHYY v. Glassboro,* 393 U.S. 117 (1968), *Wheeling Steel Corp. v. Glander,* 337 U.S. 562 (1949), and the decisions of this Court cited in the Taxpayer's petition, especially when those discriminatory provisions constitute an impediment to movements in interstate commerce.

its recent previous decisions in *Bacchus* and the other interstate commerce cases cited in the Taxpayer's petition and motion for limited summary disposition. See particularly, in this connection, *Armco, Inc. v. Hardesty,* 467 U.S. ____, 81 L.Ed.2d 540 (1984), where this Court set aside a West Virginia wholesale gross receipts tax from which local manufacturers were exempt and, in so doing, had to distinguish dismissal of an appeal on the same or a similar issue in a recent previous case (see fn 7, last paragraph of opinion). Thus, in the interest of uniformity of interpretation of the Commerce Clause and so as not to discriminate against jurisdictions whose taxes have already been struck down, this Court should accept this appeal and reverse the lower courts' upholding of this discriminatory tax structure, which we submit it can do by summary disposition as outlined in the Taxpayer's motion.

The undersigned counsel hereby certifies that, because of the recent rendition of the decision in *Metropolitan Life* and the desirability to present the same for consideration in this appeal, this supplement to motion is presented in good faith and not for delay.

WHEREFORE, the Taxpayer respectfully requests this Court's consideration of the foregoing supplemental matter and disposition of this appeal, summarily under Rule 16.7 or otherwise, by reversal and remanding of this case so as to prevent imposition of the discriminatory taxation appealed to this Court.

Respectfully submitted,

/s/ ROBERT R. REID, JR.

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April 29, 1985